

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

MAY 29 2008

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,

Appellee,

v.

GERARDO ESCARCEGA RUIZ,

Appellant.

)  
)  
) 2 CA-CR 2007-0076  
) DEPARTMENT A  
)

MEMORANDUM DECISION

)  
) Not for Publication  
) Rule 111, Rules of  
) the Supreme Court  
)  
)

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20062584

Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

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Terry Goddard, Arizona Attorney General  
By Randall M. Howe and Laura P. Chiasson

Tucson  
Attorneys for Appellee

Law Office of Thomas E. Higgins  
By Thomas E. Higgins

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PELANDER, Chief Judge.

¶1 Following a jury trial, Gerardo Escarcega Ruiz was convicted of four counts of aggravated assault and one count of drive-by shooting. The trial court sentenced him to presumptive, concurrent prison terms, the longest of which is 10.5 years. On appeal, he argues the court erred in denying his motion for judgment of acquittal, made pursuant to Rule 20, Ariz. R. Crim. P., and in instructing the jury on aggravated assault. Finding no error, we affirm.

### **1. Rule 20 Motion**

¶2 Ruiz contends the trial court should have granted his Rule 20 motion because the evidence was insufficient to support any of his convictions. When considering claims of insufficient evidence, “we view the evidence in the light most favorable to sustaining the verdict and reverse only if no substantial evidence supports the conviction.” *State v. Pena*, 209 Ariz. 503, ¶ 7, 104 P.3d 873, 875 (App. 2005). ““Substantial evidence is proof that reasonable persons could accept as sufficient to support a conclusion of a defendant’s guilt beyond a reasonable doubt.”” *State v. Hall*, 204 Ariz. 442, ¶ 49, 65 P.3d 90, 102 (2003), quoting *State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996). The evidence required to support a conviction can be direct or circumstantial. *Pena*, 209 Ariz. 503, ¶ 7, 104 P.3d at 875. We will not disturb a trial court’s denial of a Rule 20 motion absent an abuse of discretion. See *State v. McCurdy*, 216 Ariz. 567, ¶ 14, 169 P.3d 931, 937 (App. 2007).

¶3 One of the four victims, Rosemary, was Ruiz’s former girlfriend. After a seven-year relationship during which they had three children together, Rosemary and Ruiz separated about two and a half months before the incident. On the night of the shooting, the victims went together to a bar, where Rosemary had a brief altercation with Ruiz’s sister in which the sister asked Rosemary what she was doing there and threatened to “kick [her] ass.” When the victims left the bar around two o’clock in the morning, Rosemary saw Ruiz’s sister talking on her cellular telephone. As they were driving home, the victims noticed a white pick-up truck, which Rosemary recognized as Ruiz’s, closely following their car. Ruiz was the sole occupant in the truck. In attempting to elude the truck, the victims turned onto a dead-end street, and Ruiz then blocked their exit with his truck. With his truck stopped, Ruiz rolled down the passenger side window, stared out of it toward the victims, and fired three shots out that window at the victims’ car, shattering the glass of its driver’s side window. The four victims were not seriously injured but received some cuts from the glass.

¶4 Ruiz maintains there was insufficient evidence to support the aggravated assault convictions because three of the four victims did not identify him. And Rosemary’s identification of him as the shooter “was suspect,” he asserts, because she inaccurately described his clothing that night, admittedly had consumed alcohol, and therefore had let one of the other victims drive her car when they left the bar. But it is the jury’s role to weigh the evidence and determine witness credibility. *See State v. Cox*, 217 Ariz. 353, ¶ 27, 174 P.3d 265, 269 (2007); *State v. King*, 213 Ariz. 632, ¶ 34, 146 P.3d 1274, 1282 (App.

2006). And, as the state points out, sufficient evidence of Ruiz's identity was presented at trial. *See Hall*, 204 Ariz. 442, ¶ 49, 65 P.3d at 102.

¶5 Rosemary testified that she easily had recognized the truck as Ruiz's based on several distinctive features it had. She also testified that she "could . . . clearly see who was in the truck" when its driver rolled down the passenger window and stared out, and it was Ruiz. From her testimony alone, which the jury apparently found credible, a reasonable fact finder could conclude that Ruiz was the shooter. *See State v. Dickens*, 187 Ariz. 1, 21, 926 P.2d 468, 488 (1996); *see also State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990) ("Substantial evidence . . . is such proof that 'reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'"), *quoting State v. Jones*, 125 Ariz. 417, 419, 610 P.2d 51, 53 (1980).

¶6 Ruiz also points to the lack of any physical evidence linking him to the shooting. After the shooting, the victims drove away and stopped near a patrol car they saw in the area. When Rosemary then saw Ruiz's truck again, she pointed it out to the police and noted the direction in which it was heading. Shortly thereafter, an officer located the truck and its driver, Ruiz, within a few miles of the shooting. Ruiz was the only occupant in the truck. The police did not find a gun, bullets, or shell casings in his truck, nor did the state present evidence to show the shell casings found at the scene matched the bullet lodged in the victim's car. But about ten minutes elapsed before Ruiz was located and detained several miles from the shooting site, giving him time and opportunity to dispose of the

weapon. And Rosemary testified that she previously had seen Ruiz with a gun similar to the one she had seen in the shooting.

¶7 “Physical evidence is not required to sustain a conviction where the totality of the circumstances demonstrates guilt beyond a reasonable doubt.” *State v. Cañez*, 202 Ariz. 133, ¶ 42, 42 P.3d 564, 580 (2002). And substantial evidence can be either direct or circumstantial. *Pena*, 209 Ariz. 503, ¶ 7, 104 P.3d at 875. In short, the lack of physical evidence did not require the trial court to grant the Rule 20 motion.

¶8 Ruiz also contends the evidence was insufficient to support the aggravated assault conviction relating to one of the victims, Andres, who did not testify at trial and apparently gave no statement to police. A person commits aggravated assault if, by use of a deadly weapon or dangerous instrument, he “[i]ntentionally plac[es] another person in reasonable apprehension of imminent physical injury.” A.R.S. §§ 13-1203(A)(2), 13-1204(A)(2). According to Ruiz, there was “no evidence that [Andres] reacted to the shooting in any way.” We disagree.

¶9 The other three victims in the car testified that Andres had ducked down when the shooting began and also had pushed Rosemary and yelled at her to get down, trying to remove her from danger. That evidence supported a finding that Andres had reacted to the shots “in reasonable apprehension of imminent physical injury.” § 13-1203(A)(2); *see also State v. Valdez*, 160 Ariz. 9, 11, 770 P.2d 313, 315 (1989) (victim’s testimony that he actually had been afraid or apprehensive not required); *State v. Baldenegro*, 188 Ariz. 10,

13-14, 932 P.2d 275, 278-79 (App. 1996) (apprehension of victim can be shown by “trying to maneuver to avoid getting shot or by crying out”). In sum, sufficient evidence supported all of Ruiz’s convictions and, therefore, the trial court did not err in denying his Rule 20 motion.

## **2. Jury Instruction**

¶10 Ruiz next argues the trial court erroneously instructed the jury on “the alternative theory” of “aggravated assault—physical injury” when he was only charged “with aggravated assault with a deadly weapon or dangerous instrument pursuant to A.R.S. § 13-1204(A)(2).” Because Ruiz failed to object below to the instruction, we review this claim for fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005); *see also State v. Simpson*, 217 Ariz. 326, ¶ 12, 173 P.3d 1027, 1029 (App. 2007). Fundamental error is “error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.” *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607, *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). “To obtain relief under the fundamental error standard of review, [a defendant] must first prove error.” *Id.* ¶ 23.

¶11 Here, the trial court properly instructed the jury that aggravated assault requires proof of “two things”: 1) “The defendant committed an assault which requires proof that the defendant intentionally put another person in reasonable apprehension of

immediate physical injury; or that the defendant intentionally, knowingly or recklessly caused physical injury to another”; and 2) “[T]he assault was aggravated by the following factor: The defendant used a deadly weapon or dangerous instrument.” *See* §§ 13-1203(A)(1), (A)(2), 13-1204(A)(2). The court then defined both “physical injury” and “serious physical injury.” *See* A.R.S. § 13-105(29), (34).

¶12 Ruiz maintains the trial court erred in “instruct[ing] the jury concerning serious physical injury regarding the aggravated assault charge on Rosemary” when she received only minor cuts. The trial court’s instruction on aggravated assault, however, referred in the alternative to “physical injury,” not “serious physical injury.” Rosemary testified at trial she had suffered minor lacerations to her legs from the shattered window glass and had bled from those wounds. One commits assault by either causing “reasonable apprehension of physical injury” or “any physical injury to another person.” § 13-1203(A)(1), (A)(2). Rosemary’s cuts, although minor, could be considered physical injury. *Cf. State v. George*, 206 Ariz. 436, ¶¶ 7-14, 79 P.3d 1050, 1054-57 (App. 2003) (differentiating mere physical injury from serious physical injury). The trial court also correctly told the jury that aggravated assault, as charged in this case, required use of “a deadly weapon or dangerous instrument.” § 13-1204(A)(2). The court did not instruct the jury that aggravated assault required “serious physical injury” or instruct it on an “alternative theory” of “aggravated assault—physical injury” as Ruiz suggests. Rather, the court only mentioned “serious physical injury” in its definitional instructions, to which Ruiz did not object.

¶13 Ruiz now argues the trial court erred in including the definition of “serious physical injury” when instructing the jury. Because the jury’s verdict form and actual instruction on aggravated assault were correct, the inclusion of this extra, superfluous definition did not undermine the validity of the aggravated assault instruction. Although the trial court mistakenly or inadvertently included that definition in its instructions, the state never suggested or argued that any of the victims had sustained serious physical injury. When, as here, “the instructions as a whole are ‘substantially free from error,’ the court should affirm the convictions.” *Cox*, 217 Ariz. 353, ¶ 15, 174 P.3d at 268, *quoting State v. Norgard*, 103 Ariz. 381, 383, 442 P.2d 544, 546 (1968). And, absent any showing that any instructional error was either fundamental or prejudicial, Ruiz is not entitled to relief. *See State v. Bartolini*, 214 Ariz. 561, ¶ 13, 155 P.3d 1085, 1089 (App. 2007).

### **Disposition**

¶14 Ruiz’s convictions and sentences are affirmed.

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JOHN PELANDER, Chief Judge

CONCURRING:

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JOSEPH W. HOWARD, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge